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der one statute was held to be a bar to another for the same offence, although in a different form and under a different statute. This view is decisive of the only question actually raised in the principal case.

The dictum; that where the former adjudication is relied upon as an estoppel in regard to particular facts, it must appear by the record in the former action that such facts were in issue and directly passed upon, and the estoppel must be so pleaded, is well settled: *Vooght v. Winch*, 2 B. & Ald. 668; *Outram v. Morewood*, 3 East 345; *Hopkins v. Lee*, 6 Wheaton 109; *Fairman v. Bacon*, 8 Conn. 418; *Gray v. Pingry*, *supra*.

It is said in some cases that where the question was, in fact, determined in the former action, but that does not appear upon the record, and where of course it cannot be pleaded as an estoppel of record, it may nevertheless be

given in evidence in any subsequent action between the same parties, where the same facts are involved, and will have such weight as the triers choose to give it: *Vooght v. Winch*, *supra*; *Outram v. Morewood*, *Gray v. Pingry*, *supra*. The precise effect of such a new finding, when acted upon in a subsequent action, seems not well settled. Our own views were expressed in the case last cited, and need not be repeated. And it is well settled that a judgment-bond upon specific recitals upon the record will not, as matter of course, prove such recitals to the full extent, but only so far as is requisite to uphold the judgment: *Burlen v. Shannon*, 99 Mass. 200; Phil. Ev., ch. 2, § 2; *Hotchkiss v. Nichols*, 3 Day 138; *Coit v. Tracy*, 8 Conn. 266; where it is said: "Facts found by a former decree, which were not necessary to uphold the decree, do not conclude the parties." I. F. R.

### *Supreme Court of Errors of Connecticut.*

#### ABIGAIL HANFORD v. HARVEY FITCH AND OTHERS.

The petitioner in 1820, then a married woman, joined with her husband in mortgaging for his debt a piece of land owned by her, soon after which she removed with her husband from the state, and they continued to reside out of the state until 1869, when he died. Immediately after the execution of the mortgage, C., a creditor of the husband, attached his life-interest as tenant by the curtesy in the land, and afterwards had it set off to him in part satisfaction of the judgment which he obtained. In 1822, C. purchased the mortgage interest, taking a quit-claim of the land from the mortgagee, and three months after he conveyed the land by a warranty deed to a purchaser, from whom by sundry conveyances the land came in different parcels to the respondents. The land was originally of little value, unfitted for cultivation or for building purposes, but the respondents had at great expense graded and erected houses and other buildings upon it. At the time C. made the conveyance he was in actual possession of the land, but it did not appear when he took possession nor whether under his mortgage title or that derived from the levy of his execution. No interest upon the mortgage debt was ever paid by the petitioner or her husband, nor was any attention given by either of them to the property before his death. After his death, the petitioner inquired about the property and demanded possession, which being refused she brought a bill in equity to redeem. *Held*, 1. That if C. was to be regarded as having taken possession under the levy of his execution the petitioner would not be barred by the

Statute of Limitations. 2. But that, in the absence of any evidence on the subject, and after so great a lapse of time, the court would presume that he had abandoned his claim under the levy and had taken possession as mortgagee. 3. That his possession as mortgagee, and that of those deriving title from him, being adverse to the petitioner, she would be barred by the Statute of Limitations. (Two judges dissenting.)

A married woman who executes a mortgage of her land with her husband, is not saved by her coverture from the running of the Statute of Limitations against her title in favor of the mortgagee.

BILL to redeem mortgaged premises and to remove a cloud from a title; brought to the Superior Court in Fairfield county. The following facts were found by a committee:

In 1812, the petitioner was married to one Zalmon Hanford, with whom she lived thereafter till his death, which took place in 1869. There was issue of the marriage born alive, and capable of inheriting the property hereinafter mentioned.

In 1818, the land in question was conveyed to the petitioner by David and Silas C. Lockwood, who were the lawful owners of the same. The consideration for the conveyance was the sum of \$550, which was paid out of the proceeds of a prior sale of real estate belonging to the petitioner, and which she had inherited from her mother.

On March 14th 1820, Zalmon Hanford was indebted to Eli B. Bennett of Norwalk, by his promissory note of that date, in the sum of \$224.08, payable on demand, with interest, the consideration of which was dry goods, groceries and provisions, before that time sold by Bennett to Hanford, as supplies for his family; and to secure the payment of the note, the petitioner and said Zalmon on that day executed and delivered to Bennett a mortgage of the land in question, which was on the same day recorded in Norwalk.

Very soon after the execution of the mortgage, the petitioner and her husband left Norwalk, and went to reside in the state of New York, where they lived about thirteen years, and then removed to Ohio, where they remained until about the year 1843, and then removed to the state of Illinois, where they resided till his death, and where the petitioner still resides.

Neither the petitioner nor her husband ever had any actual possession of the land after their removal from Norwalk, and Bennett never took possession. At the time of their removal it had been cultivated only to a limited extent, and no buildings had been erected upon it.

On the 14th of March 1820, said Zalmon was indebted to one Samuel Cannon of Norwalk, by his promissory note for \$100, which was executed and dated December 9th 1815, and on said 14th of March 1820, Cannon commenced a suit upon the note, by a writ of attachment, which was served by attaching all the right and interest of said Zalmon in the land in question; the attachment being subsequent to Bennett's mortgage. The writ was returnable to the county court for Fairfield county at its April Term 1820, at which term Cannon recovered judgment by default against said Zalmon for \$114.20 damages and \$9.70 costs; on which judgment execution was taken out in due form, and on the 19th of August 1820, levied on his interest in the land, which was appraised at \$55.92, and the same was set off in favor of Cannon, in part satisfaction of the execution; and the execution, with the endorsement of the officer's doings thereon, was, on the 29th day of August 1820, duly returned to court. There was no evidence that the execution was ever recorded by the clerk of the court, unless the same was to be implied from the facts found; and if, in the opinion of the court, the recording was to be inferred from the facts found, then the recording was found as a fact, otherwise not.

Cannon entered into possession of the land at some time between the levy of the execution and 18th June 1822, but the evidence did not enable the committee to fix the date of his taking possession, nor the title or claim of title under which he entered into possession, unless the same could be implied from the facts found.

On March 18th 1822, said Bennett gave to Cannon a quit-claim deed of that date, of the land mortgaged to him by the petitioner and said Zalmon. The consideration paid by Cannon to Bennett for the deed was \$244.81. The amount then due on the mortgage-note was \$251.11. Upon the payment of the consideration, the mortgage-note was delivered to Cannon, with the quit-claim deed, but the mortgage was not delivered, and no other writing or assignment was made between Bennett and Cannon. At the time of this transaction nothing had been paid on the mortgage-note, either upon the principal or as interest, and Bennett had not asked payment from Cannon, nor taken any steps towards collecting the note or the foreclosing of the mortgage. Cannon's intention and object in the transaction with Bennett was not to pay off and extin-

guish the mortgage, but to purchase and hold it as a subsisting encumbrance on the land.

On June 18th 1822, by warranty deed of that date, Cannon conveyed all his interest in the land to one Samuel Gray, who entered into possession of the same. Gray occupied the premises until the 17th of January 1824, when he purchased of one Marvin an additional tract of land, containing about one acre, adjoining the land in question on the south and west; and on the 27th of April 1827, he conveyed the entire tract of land, as thus enlarged, by warranty deed of the date, to Esther Hubbell, of Norwalk, from whom the same has come through a large number of intermediate holders and possessors, and by numerous and an unbroken succession of deeds, mainly of warranty, and all duly recorded at or about the times of their respective dates, into the several possession and occupancy of the respondents; all of whom purchased and now hold their respective portions of the land under a *bonâ fide* claim of title. In so much of the land now occupied by the respondents, as was embraced in the original deed from David and Silas C. Lockwood to the petitioner, the respondents have no title, except such as they may derive through Cannon's deed to Gray, and the subsequent conveyances referred to, and such as they may derive from the occupancy of the premises, under the facts and circumstances found.

No payment of interest or principal, or any part thereof, has ever been made on the mortgage-debt, and there is no record or other evidence that the mortgage has ever been foreclosed. The question whether such foreclosure may be presumed from the lapse of time and the facts found, was submitted by the committee to the court.

After the deed from Cannon to Gray, of June 18th 1822, no reference has ever been made in any of the subsequent deeds through which the respondents claim title, to the Bennett mortgage.

If the court should consider the Bennett mortgage as a still subsisting encumbrance on the land, then the committee found the amount due on the mortgage, computing interest to the 14th day of March 1874, to be the sum of \$950.09. The petitioner never requested a reconveyance of the legal title which passed by the mortgage, from any one, till the 6th day of October 1870, when she requested the respondents severally to release to her, by suita-

ble deeds, the legal title to the premises held by them respectively, which they severally refused to do.

The petitioner never asserted any claim of interest in the land until some time in the summer of 1869, after the death of her husband, nor were any of the respondents in any way informed of her claim of an interest in the premises until they received notice from her present attorneys, in the fall of 1870, a very short time before the petition was served.

The several respondents purchased their respective interests in the premises, for full consideration, in good faith, without any notice or suspicion of any adverse claim or interest therein on the part of the petitioner, or of any person or persons. The records of lands, however, in the town of Norwalk, disclosed the state of the title to the premises, and such notice as the law implies from this fact the respondents had, but no actual notice.

At the time of its purchase by Gray the land was very rough and barren, and poorly adapted to either agricultural or building purposes. Since that time the respondents, and various prior occupants, in good faith, without notice of any claim or interest on the part of the petitioner in the premises, and in the belief on their part that they held perfect titles to the fee of the land, have at great expense made many improvements on the land by grading, draining and enriching the soil, and by setting out trees and shrubbery, and have also erected four dwelling-houses, with out-buildings and fences, which the respondents now occupy as their homesteads.

Upon these facts the case was reserved for the advice of this court.

*L. Warner and Woodward*, for the petitioner.

*Smith* (with whom was *Beardsley*), for respondents.

PARK, C. J.—The petitioner seeks, by force of a mere technical right, to recover the possession of premises which have become of great value by reason of improvements made upon them, while it is evident that she abandoned all her interest in them nearly fifty years ago. During all this period she has paid no interest on the note which the mortgage of her property was given to secure, nor has she looked after the property, or showed any interest in it. She has done nothing whatsoever indicating an intention ever to redeem the mortgage until recently, and it is manifest that her

desire to do so now is wholly owing to the great advance of the property in value since the mortgage was given.

The claim of the petitioner is based upon the assumption that Cannon, the execution-creditor, went into the actual possession of the life-estate under and by virtue of the execution which was levied in his favor on the life-estate of Zalmon Hanford, the late husband of the petitioner, and that both he and the parties claiming under him continued to hold possession of the land, under the execution-levy, during the life of Zalmon Hanford. If this was so in fact, then the prayer of the petitioner should be granted.

But if such was not the case, if Cannon never took possession of the land under the levy of his execution, but abandoned the interest he acquired by the levy, and some two years subsequently went into the actual possession of the land under the mortgage interest which he had purchased, and claimed the entire property as his own under such purchase, and possessed it accordingly, and this possession was continued by the parties claiming the land under him, then the right of the petitioner has long since been extinguished.

Whether the one state of facts or the other existed in this case, is the question we have to determine.

It appears in the case that for nearly half a century the land in question has been held by absolute deeds; that during this period it has passed from grantor to grantee through many conveyances, the grantor in nearly every instance warranting the title in fee to his immediate successor; that the parties to these conveyances purchased the land in good faith, without notice of any claim whatever to it on the part of the petitioner; that the land was barren originally, and was poorly adapted to agriculture; that it has been divided into building lots, and has been graded, drained and enriched at great expense; that trees and shrubbery have been set out and other improvements made upon it; and that dwelling-houses, out-buildings and fences, have been erected upon it. Thus it appears that, during this long period of time, parties in possession of the land have constantly exercised acts of absolute ownership over it, and unless some unsurmountable obstacle prevents the running of the Statute of Limitations against the petitioner's claim, the case is one of the strongest character going to show that the statute has long since extinguished her interest.

The only difficulty in the case arises from the fact that Cannon

levied his execution on the life-estate of Zalmon Hanford, and had it set off in part satisfaction of his debt, but whether he ever went into possession of the land under his levy, or claimed anything whatsoever from it, does not appear. It is found that he levied his execution, and there the finding leaves the matter. It is true that he was in possession of the land on the 18th day of June 1822, nearly two years after the levy of his execution, but it is also true that three months previous to that time he purchased an outstanding mortgage on the entire property, and received a quit-claim deed of the same, which conveyed to him the legal title to the property. This accounts for his possession at that time, while there is an indication that his possession was under his quit-claim deed, in the fact that on that day he gave an absolute deed of the entire property, and warranted the title to his grantee.

There is nothing going to show any previous possession under the levy of the execution except the presumption of law that a party is in possession of land which he owns unless it appears to be in the actual possession of another. But this presumption has no reference to actual possession. It relates to constructive possession merely; and the rule was established for the benefit of the owner.

Nothing therefore appears in the case to show that Cannon ever in fact took or held possession of the land under his execution title, and the burden is on the petitioner to show that it was so held in order to avoid the running of the Statute of Limitations against her claims.

The life-estate was of little or no value at the time of the levy of the execution, and there could have been but little object in keeping it alive. The land was barren, and poorly adapted to agriculture, and it is manifest that the life-estate was not valuable for any other purpose. It required great expense to grade it for building purposes, and no man would think of incurring the expense necessarily attending the erection of buildings on the land when it was held by so precarious a tenure. The life-estate might terminate at any moment and valuable improvements consequently would be lost.

And furthermore, at the time that Cannon went into possession of the property under his mortgage interest, the entire property was not worth the amount of the mortgage, for he purchased it at less than the amount. The mortgage covered the entire property,

and was the first encumbrance on it, and it is unreasonable to suppose that the owner of the mortgage would have sold it for less than the amount of the mortgage-debt if the land was of greater value than the mortgage. It is therefore fair to presume that the life-estate in the hands of Cannon was of no value when he went into possession of the land under his mortgage interest. This accounts for his not going into possession of the property under the levy of his execution. It accounts too for his conveying the property by a deed of warranty, for he considered his mortgage-deed as equivalent to an absolute deed of the property, inasmuch as it represented its entire value.

We think therefore that the case shows that Cannon abandoned his levy for the benefit of the petitioner, and we may presume from the great length of time that the property has been held by parties in possession of the land, as absolute owners, that he quit-claimed to her all his interest acquired by the levy, and afterwards went into possession of the land under his mortgage-deed. Similar presumptions are made in cases of landlord and tenant, where the tenant and parties claiming the land under him have for many years occupied the land as absolute owners. The law presumes in such cases that the tenant surrendered the tenancy to his landlord together with the possession of the property, and subsequently ousted him of the possession. It was so held by this court in the case of *Camp v. Camp*, 5 Conn. 291. In that case a tenant at will remained, after the death of the landlord, in the exclusive and uninterrupted possession of the land, claiming it as his own, for a period of fifty-seven years. It was held by the court, that although as a general rule a tenant is estopped to deny the title of his landlord, and although a person once a tenant will *prima facie* be deemed to continue in that character so long as he remains in possession of the land demised, yet it is competent for such person to show that the relation has been dissolved. And it was further held that, from the long period of time that the property had been adversely held, the jury were authorized to presume a restoration of the land to the heirs of the lessor, and afterwards an ouster of them, thereby dissolving the relation which at first subsisted. The analogy of this case to the present one is apparent. There can be but little difference in principle, so far as the present question is concerned, between a tenant for life and a tenant for years. Acts of absolute ownership are as much inconsistent with the one

as with the other, and if in the one case, where such acts have been long continued, the jury may be warranted in finding that the property had been surrendered to the landlord, and an ouster afterward committed, so may the presumption we have stated be warranted in the case at bar.

The Supreme Court of the United States, in the case of *Willison v. Walkins*, 3 Pet. 43, says: "It is an undoubted principle of law fully recognised by this court, that a tenant cannot dispute the title of his landlord, by setting up a title either in himself or in a third person, during the existence of the lease or tenancy. \* \* \* The same principle applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning or to admit of a doubt. But we do not think that in any of these relations it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession for such length of time that the act of limitation has run out four times before he has done any act to assert his right to the land. Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them." This case is a strong one on the point we are considering. The court say: "Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility;" that is, the assumption of absolute ownership of the property would forfeit a lease executed with all the forms of law and cause the premises to revert to the landlord, who might immediately treat his former tenant as a trespasser.

This case goes farther, perhaps, than our own courts would be prepared to go. We should, probably, have applied to the case the doctrine of *Camp v. Camp*, and have held that the disclaimer, taken in connection with the adverse possession of the premises, was sufficient to warrant the jury in finding a surrender of the tenancy to the landlord and an ouster afterwards. See also *Blight's Lessee v. Rochester*, 7 Wheat. 535; Adams on Ejectment 118; Bull. N. P. 96.

We think therefore that the life-estate of Zalmon Hanford terminated in the manner we have supposed when Cannon went into possession of the land under his mortgage-deed ; and that consequently there was nothing afterwards to prevent the running of the Statute of Limitations against the petitioner's claim, for the law is well settled that a mortgagee may hold land adversely so that his possession will eventually ripen into an absolute title : *Bunce v. Wolcott*, 2 Conn. 27 ; *Jarvis v. Woodruff*, 22 Conn. 548.

The conclusion we have come to in the case is clearly equitable. The petitioner had ample notice from the acts of the parties holding the land, that they were not holding it under the levy of the execution, but in their own right as absolute owners, and for nearly fifty years she appears to have acquiesced in the right and to have abandoned her equity of redemption.

In coming to the conclusion at which we have arrived, we have not overlooked the fact that the petitioner, until the year 1869, was a married woman. If it were an ordinary case of adverse possession of her land, her coverture would save her from the application of the Statute of Limitations. But we think that a wife who joins with her husband in a mortgage of her land is not protected by her coverture from the ordinary effect of the adverse possession of the mortgagee. This adverse possession is not strictly against the legal title of the mortgagors ; for, as between himself and them, he has the legal title, and they have as against him no right of entry to be barred ; but the adverse possession is against the equitable right of the mortgagors to redeem, so that a court of equity in holding their right to redeem to be barred by the lapse of time, is merely applying an equitable limitation, in analogy to the Statute of Limitations at law, and we regard it as equitable that the wife, who has voluntarily placed herself in the position of a mortgagor, should be held to have accepted all the usual conditions and incidents of the position, and that her right to redeem is lost in equity when there has been such a lapse of time as would in equity bar the right of an ordinary mortgagor to redeem. We think, too, that, in view of the tendency of our legislation as well as of the decisions of the courts throughout the country, to recognise the separate rights of married women with regard to their property, and their power to control the same, our courts should lean towards an enlargement of their responsibility and duty with re-

gard to their property, and a curtailment of those exemptions and privileges that were given to married women as an offset for their want of power.

We advise the Superior Court to dismiss the petition.

In this opinion CARPENTER and PHELPS, JJ., concurred. FOSTER and PARDEE, JJ., dissented.

The question, whether a party has title to a certain estate, as an entire question, is one of fact, although its solution may depend on law, and if an appellant would have the case reviewed, he must have the findings such that the matters of fact, which raise the question of law involved, shall be fully settled: *Farnham v. Hotchkiss*, 1 Abb. (N. Y.) App. Dec. 93. But the petitioner is not obliged to present proof of facts which are presumed by law: *Dugas v. Estilets*, 5 La. Ann. 560; *Davenport v. Mason*, 5 Mass. 85; *Baalam v. State*, 17 Ala. 451. And it is a presumption of law that the owner is in possession of his own, and it is also a presumption of law, that the levy of attachment was, after being returned by the officer, duly recorded by the clerk, for which precise condition we are unable to find any precedent; still if the record by the clerk which it was his duty to make, may be presumed to have been made, then Cannon, the party under whom the respondents claim title, was the owner of a life-interest in the premises, and is presumed by law to have been in possession two years before he purchased a quit-claim deed of the petitioner's mortgagee. And if Cannon was in possession of the premises as owner of a life-estate therein at the time he purchased a quit-claim from the mortgagee, it is necessary to show some act of foreclosure other than the mere purchase of the quit-claim, in order to render the possession adverse to the petitioner's right in remainder. The registration of a deed is not notice of its contents to any except subsequent purchasers, unless made so by stat-

ute: *Baker v. Washington*, 5 Stew. (Ala.) 142; *Tetham v. Young*, 1 Port. (Ala.) 298, and it is not so constituted by statute in Connecticut. And this is the only act of Cannoa which can be considered as approaching to notice of adverse possession.

But if this hypothesis, which depends for its support upon the presumption that the execution was recorded by the clerk of the court, cannot be maintained, there still remains a more difficult question to answer, namely the petitioner's coverture until 1869. In Connecticut it has been held that title by adverse possession cannot be acquired against a married woman during coverture: *Gage v. Smith*, 27 Conn. 70; *Watson v. Watson*, 10 Id. 77. And it has been very generally held, in nearly all the states of the union, that the Statute of Limitations does not begin to run against a married woman while she is covert: *Sedy v. Clopton*, 6 Ala. 589; *Michau v. Wyatt*, 21 Id. 813; *Wilson v. Wilson*, 36 Cal. 447; *Fatheree v. Fletcher*, 31 Miss. 265; *Fearn v. Shiley*, 31 Miss. 301; *Caldwell v. Black*, 5 Ired. (N. C.) L. 463; *McLean v. Jackson*, 12 Id. 149; *McLean v. Moore*, 6 Jones (N. C.) L. 520; *Jones v. Reese*, 6 Rich. (S. C.) 132.

And how the wife joining with her husband in a mortgage-deed can make any difference beyond giving the mortgagee a right to foreclose, we are unable to see. That the mortgagee has the right of foreclosure is indisputable, and a decree against the husband and wife would have barred both: 6 B. Mon. (Ky.) 376. And this we think is all

that the wife can have been held to have consented to in joining with her husband in the mortgage-deed. The applicability or non-applicability of the Statute of Limitations depends on the capacity or non-capacity of the defendant to sue, and not on the existence or non-existence in her of a right of disposal: *Funkhouser v. Langhoph*, 26 Mo. 453. But in Connecticut the only provision in regard to the rights of married women to sue or to be sued in their own names relates to the contingency of their carrying on a separate business under their own names; and in actions of eject-

ment the Connecticut statute allows five years to a person after the removal of disability, in which to bring suit, and this provision may be said to apply equally to a bill in equity to redeem; since equity acts upon the Statutes of Limitations only from analogy and in the case of a mortgage takes the analogy from the ordinary limitation to rights of entry and actions of ejectment: Story's Equity Jurisprudence, §§ 64 a, 1028 a, and in this instance the petitioner seems to have brought her bill within the five years.

L. C. R.

### *Supreme Court of Illinois.*

#### PULLMAN PALACE CAR CO. v. SMITH.

A palace or sleeping-car is not an inn, nor is the company owning it subject to the responsibilities as to traveller's baggage of an innkeeper at common law.

A traveller, who was being transported by a railroad company, to whom he had paid a fare, took a berth in a sleeping-car attached to the train, but belonging to a different company, for which he paid an extra sum to the sleeping-car company. While asleep he was robbed of a large sum of money he carried in his pocket. *Held*, that the sleeping-car company was not liable, either as an innkeeper or as a common carrier.

#### APPEAL from Cook county.

This was an action brought by Chester M. Smith, appellee, against the Pullman Palace Car Company, appellant, for the recovery of \$1180, claimed to have been lost from a Pullman sleeping-car, under the following circumstances:

Appellee, starting from his home in Oconomowoc, Wis., for a point in Missouri, south-west of St. Louis, for the purpose of buying horses and mules, purchased a ticket through to St. Louis, *via* The Milwaukee and St. Paul Railway to Chicago, thence to St. Louis, over the Alton and St. Louis Railway. He arrived at Chicago about eight o'clock in the evening and bought from appellant a sleeping-car ticket from Chicago to East St. Louis, for which he paid the sum of two dollars, and took a berth in the Pullman car, which left Chicago for St. Louis, at nine o'clock P. M. His money, \$1180, was in an inside vest pocket, and when he retired for the night, the vest was placed under his pillow; in